**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of | ) | |
| NATIONWIDE PROGRAMMATIC | ) | WT Docket No. 03-128 |
| AGREEMENT REGARDING THE | ) | |
| SECTION 106 NATIONAL HISTORIC | ) | |
| PRESERVATION ACT REVIEW PROCESS | ) | |
| | ) | |

To: The Commission

## REPLY COMMENTS OF THE NEW YORK BOTANICAL GARDEN

The New York Botanical Garden (the "Garden") hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding concerning the proposed Nationwide Programmatic Agreement ("NPA").[1] The Garden's primary interest in this proceeding is to reply to the comments filed by Fordham University ("Fordham"). The Garden is concerned that Fordham may be attempting to use this proceeding as a "backdoor" means of avoiding its responsibilities under the National Historic Preservation Act ("NHPA") with respect to its ongoing dispute with the Garden over a proposed tower for Fordham's radio station, WFUV (FM). Secondarily, the Garden wishes to respond briefly to some of the more extreme — and utterly baseless — suggestions proffered by certain industry commenters (e.g., that tower siting decisions are not subject to the NHPA, and that towers cannot have an adverse effect on a historic property unless they are built on that property).

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[1] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Notice of Proposed Rulemaking, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("Notice of Proposed Rulemaking").

## I. BACKGROUND

At present, Fordham's proposed, and currently half-built, tower is the subject of an ongoing consultation under Section 106 of the NHPA.[2] The tower stands immediately adjacent to the Garden which is: (i) a designated National Historic Landmark; and (ii) listed in the National Register of Historic Places (the "National Register").[3]

The Garden's ongoing dispute with Fordham concerning the WFUV tower has involved lengthy Commission proceedings raising many complex legal and factual issues. The Garden will forego a full recounting of those proceedings, but nonetheless is compelled to provide a brief overview to highlight some of the events that Fordham neglected to mention in its comments. This overview also refutes the suggestion propounded by some industry commenters that tower siting decisions generally are unlikely to have adverse visual effects on historic properties.

For over 50 years, WFUV broadcast from an antenna located on top of Fordham's Keating Hall.[4] In an effort to upgrade WFUV's facilities, Fordham filed various applications and amendments ultimately leading to a June 1992 amendment (the

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[2] 16 U.S.C. § 470f.

[3] See Letter from Linda Blair, Chief, Audio Services Division, FCC, to David S. Gillespie, Director, New York State Office of Parks, Recreation, and Historic Preservation, dated May 23, 1997, 12 FCC Rcd 6774, 6778 (1997) ("Letter to David S. Gillespie").

[4] See Letter from Margot Polivy, Counsel for Fordham, to Magalie R. Salas, Secretary, FCC, dated August 11, 1998.

"Amended Application") that proposed to construct a 480-foot tower adjacent to Fordham's Lombardi Memorial Center (the "Lombardi Site").[5]

Fordham's Amended Application stated that the proposed tower would not cause any impact on, inter alia, any historical, architectural, or culturally important site. Question 26 in the Amended Application asked: "Would a Commission grant of this application come within Section 1.1307 of the FCC Rules, such that it may have a significant environmental impact?"[6] Fordham responded "No." In an "Engineering Statement" appended to the Amended Application, Fordham declared that the "site area is not significant from a historical, architectural, archeological, or cultural standpoint," and "[t]he site is not listed in the National Register of Historic Places."

There is no question that these statements were false. The Lombardi Site is located just 150 feet from the Garden which, as noted above, is a designated National Historic Landmark and listed in the National Register.[7] Founded in 1891, the Garden is a 250-acre educational, cultural, and historic institution which, as the Commission has found, is "one of the largest and most significant botanical gardens in the United States."[8] On a portion of the Garden's grounds approximately 400 feet from the Lombardi Site is the Enid A. Haupt Conservatory which, apart from the Garden's existing listing in the

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5 Application For Construction Permit For Noncommercial Educational Broadcast Station, FCC Form 340, File No. BPED-831118AL (filed June 22, 1992).

6 Section 1.1307 of the Commission's Rules, 47 C.F.R. § 1.1307, in defining the scope of the "environmental" concerns covered by Question 26, includes, specifically, the construction of facilities that may affect sites or buildings that are listed in, or eligible to be listed in, the National Register.

7 See Letter to David S. Gillespie 12 FCC Rcd at 6778.

8 Id.

National Register, is separately eligible to be listed. Completed in 1902, the conservatory is one of the finest examples of Victorian crystal palace architecture, and is a designated New York City Landmark.[9]

Because Fordham failed to disclose in its Amended Application the proposed tower's close proximity to the Garden, the Mass Media Bureau (the "Bureau") granted Fordham's Amended Application without evaluating the tower's potential effects on the Garden.[10] Fordham then commenced construction of the tower.

In June 1994, having become aware of the ongoing construction, the Garden petitioned the Commission to order Fordham to halt construction and remove the tower.[11] The Garden pointed out that the Commission's grant of authority to Fordham constituted an "undertaking" subject to review under Section 106 of the NHPA, and that this review had not been conducted.

In February 1995, the Bureau ordered Fordham to halt construction and to prepare an environmental assessment ("EA").[12] By this time, the partially built tower had reached a height of 260 feet.[13] Fordham filed its EA, and various interested persons, including the Garden, filed comments.[14]

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[9] Id.

[10] See FM Broadcast Station Construction Permit, File No. BPED-831118AL (granted December 7, 1992, and reissued August 4, 1993).

[11] See Letter from Howard J. Braun, Counsel for the Garden, to William F. Caton, Secretary, FCC, dated June 30, 1994.

[12] See Letter from Larry D. Eads, Chief, Audio Services Division, FCC, to Margot Polivy, Counsel for Fordham, dated February 1, 1995, at 7.

[13] Letter to David S. Gillespie, 12 FCC Rcd at 6777.

[14] See id.

In May 1997, the Bureau concluded based upon the EA and the comments that a 480-foot tower at the Lombardi Site would have an adverse effect on the Garden by introducing "an obtrusive visual element into the setting of the Garden."[15] The Bureau therefore initiated a formal consultation under Section 106 of the NHPA.[16]

The consultation subsequently devolved into a confidential mediation process intended to culminate in a negotiated settlement.[17] The confidential mediation lasted for nearly three years, and was terminated in May 2000 after it became clear that the process was not going to result in a negotiated settlement.[18]

In August 1998, while the confidential mediation was still ongoing, Fordham obtained special temporary authority ("STA") to move WFUV's antenna from Keating Hall to the half-built tower.[19] Fordham subsequently obtained numerous extensions of STA which the Garden did not oppose. The Garden eventually concluded, however, that Fordham was attempting to operate from the half-built tower on a more or less permanent basis, and that Fordham's STA requests included serious misrepresentations about the circumstances purporting to require Fordham to move WFUV's antenna from Keating Hall to the half-built tower. The Garden therefore urged

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15 Id. at 6786.

16 Id.

17 See Letter from Linda Blair, Chief, Audio Services Division, FCC, to Margot Polivy, Counsel for Fordham, dated June 10, 1997.

18 See Letter from Roberta L. Cook, Office of General Counsel, FCC, to Megan Lesser Levine, New York State Office of Parks, Recreation and Historic Preservation, dated May 4, 2000.

19 See Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, FCC, to Margot Polivy, Counsel for Fordham, dated August 26, 1998.

the Bureau to deny Fordham's sixth STA request. The Bureau nonetheless granted Fordham's request. The Garden's application for review of that decision remains pending before the Commission.[20]

In February 2002, the Bureau convened a meeting to restart the formal consultation mandated by Section 106.[21] The meeting resulted in an agreement among Fordham, the Garden, the Bureau, and other interested parties on procedures for conducting the consultation.

In accordance with these procedures, Fordham subsequently updated its EA, and the Garden and other interested persons filed comments.[22] The Bureau convened a public forum on June 27, 2002, in Bronx, New York, to solicit the views of the general public about the tower.[23] Hundreds of concerned citizens participated in the forum. Further consultation was suspended shortly thereafter in order to facilitate evaluation of newly identified alternative sites.[24]

It is against this backdrop that the Garden is participating in this rulemaking proceeding. The Garden is concerned that Fordham is seeking to use the

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[20] See The New York Botanical Garden Application for Review dated February 27, 2002.

[21] See Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Margot Polivy, Counsel for Fordham, dated January 28, 2002 (reference 1800B3-MFW).

[22] See, e.g., The New York Botanical Garden Petition to Deny and Comments on Environmental Assessment filed June 3, 2002.

[23] See Open Forum On Mitigation Of Adverse Environmental Effects Of WFUV(FM)'s Proposed Facility Modification On The New York Botanical Garden, Public Notice, DA 02-1345 (June 7, 2002).

[24] See Letter from Roy J. Stewart, Chief, Office of Broadcast License Policy, Media Bureau, FCC, to Margot Polivy, Counsel for Fordham, dated August 12, 2002.

rulemaking to influence the outcome of the tower dispute by advocating in favor of procedures that would undermine the Commission's review of the WFUV tower. Given the extraordinary resources that the Garden has invested to protect its historic integrity, and the public's expressed concerns about the WFUV tower, the public interest requires that the Commission issue a decision regarding the tower based on the specific merits of the case rather than on generic rules adopted in the context of this proceeding.

## II. THE NPA MUST NOT BE APPLIED RETROACTIVELY.

The Garden strongly disagrees with those commenters who have suggested that the NPA should or could be applied retroactively.[25]

First, applying the NPA retroactively would unnecessarily complicate ongoing Section 106 cases such as the Garden's. The NPA is not designed to address ongoing Section 106 cases, which means that, if it were applied retroactively, the Commission would be required to resolve disputes over how to apply the NPA in each particular pending case. Those disputes could be highly contentious, and lead to additional and unnecessary litigation.

Second, applying the NPA to pending cases, such as the Garden's, could constitute impermissible retroactive rulemaking. For example, it would be irrational and unfair to apply the proposed NPA's categorical exclusions in cases where historic preservation issues already have been identified, and a detailed record demonstrating adverse effect already has been assembled. Adoption and implementation of the NPA

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[25] See Joint Comments of Western Wireless Corp. and T-Mobile USA, Inc.; Comments of Fordham University at 31-32. Other commenters have said that the NPA should not be applied retroactively. See Comments of PCIA at 44-45.

must not cause or encourage settled issues to be revisited, such as adverse effect determinations.

Third, the NPA is supposed to represent a consensus approach to the myriad issues it was designed to address. The commenters have expressed strongly differing opinions on many critical issues, such as the scope of the NPA's categorical exclusions. In light of those differing opinions, developing the consensus necessary to establish an NPA to govern future tower siting cases should remain the goal of this proceeding. The Commission should not unnecessarily complicate matters by attempting to formulate an NPA that also addresses pending cases.

Finally, even if the Commission decides that the NPA should be applied retroactively, that does not mean that it should be applied retroactively in all cases. For example, in cases such as the Garden's that are at an advanced stage or that have been particularly controversial, streamlined Section 106 review under the NPA would be utterly inappropriate.

## III. THE COMMISSION SHOULD REJECT FORDHAM'S PROPOSALS.

Even assuming the Commission correctly decides that the NPA should not be applied retroactively, the Garden is concerned that the final NPA could influence the outcome of the WFUV tower dispute. Fordham has made a variety of proposals that may be intended to influence the outcome of the tower dispute by establishing new Commission precedent. Although Fordham attempts to cast itself as a disinterested onlooker seeking only to share with the Commission insights gained from years of experience, the Commission would be correct to suspect otherwise.

First, Fordham states that the consideration of "alternative sites and mitigation measures . . . must be guided by the controlling goals of the applicant's proposal."[26] Translated into the context of the WFUV tower dispute, Fordham appears to be saying that it wants the Commission to recognize that the only alternative tower sites that should be considered by Fordham are those sites that would provide Fordham with 100 percent of the signal coverage that it sought in the Amended Application.

As the Garden has explained to the Commission previously, Fordham's position is unreasonable.[27] For example, the Amended Application proposed a 480-foot tower at the Lombardi Site, but the zoning laws of the City of New York prohibit any tower structure at that site that would reach a height in excess of 380 feet.[28] Thus, it would be unreasonable to evaluate alternative sites against the yardstick of the "goal[] of the applicant's proposal," which was to have the signal coverage of a 480-foot tower rather than a 380-foot tower.

Furthermore, there is no basis for Fordham's implicit assumption that the public interest will always be served by forcing the consultation process to conform to the precise "goals of the applicant's proposal." In some cases, such as the Garden's, the adverse effects may be so severe that the public interest calculus leans in favor of historic preservation over the applicant's goals, in which case the applicant should be required to accept less ambitious goals, such as a signal coverage of 80 or 90 percent of the applicant's proposal.

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[26] Comments of Fordham University at 1. See also id. at 11.

[27] See The New York Botanical Garden Petition to Deny and Comments on Environmental Assessment filed June 3, 2002, at 17.

Second, Fordham has suggested that the area of potential effects ("APE") should be smaller for towers in urban areas.[29] Again, this proposal may be directed toward the merits of the ongoing tower dispute. Presumably, Fordham would prefer an APE for its tower of less than 150 feet, in which case the tower's effects on the Garden might not even be considered by the Commission. Of course, Fordham's proposal conflicts with the fact that, even in urban areas, a tower can have a substantial adverse effect on a historic property. As the Bureau already has recognized,[30] a 480-foot tower at the Lombardi Site would have an adverse effect on the Garden, regardless of the urban setting. Indeed, a tower of any significant height at that site would have an adverse effect.[31]

Third, Fordham has proposed that the Commission should "disallow[] consideration of alternative sites not identified in the EA process without the concurrence of the broadcaster."[32] This proposal, too, has no rational basis because it would allow applicants to disregard reasonable alternatives without explanation. Under Section 106, reasonable alternatives must be evaluated, and to the extent that the passage of time creates the possibility that new alternative sites have become available, those alternative sites must be considered.

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[28] Id.

[29] Comments of Fordham University at 1, 12.

[30] See Letter to David S. Gillespie, 12 FCC Rcd at 6786.

[31] See The New York Botanical Garden Petition to Deny and Comments on Environmental Assessment filed June 3, 2002, at 13-16.

[32] Comments of Fordham University at 14.

Fourth, Fordham has proposed certain changes to the NPA that would limit the evaluation of effects on a historic property to consideration of only those characteristics that explicitly served as the basis for listing the property in the National Register.[33] Translated into the context of the Garden's dispute with Fordham, what Fordham appears to be saying is that the tower cannot be deemed to have an adverse effect on the Garden because the Garden was listed in the National Register for its "educational and scientific" characteristics. Thus, Fordham continues to refuse to recognize that Section 106 review is mandated with respect to the proposed tower because, separate and apart from the Garden's prior listing, the Garden is eligible for listing due to its status as a "designed historic landscape" and a "historic district."[34] As a consequence of this eligibility, the tower's visual effects on the Garden must be evaluated.

Fordham's position is fundamentally inconsistent with the rules of the Advisory Council on Historic Preservation (the "Advisory Council"). Those rules state that, in evaluating potential effects, "[c]onsideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register."[35] Furthermore, the rules state that "[t]he passage of time, changing

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[33] Id. at 16-18.

[34] See The New York Botanical Garden Petition to Deny and Comments on Environmental Assessment filed June 3, 2002, at 13-15.

[35] 36 C.F.R. § 800.5(a)(1) (emphasis added).

perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible for listing."[36]

Finally, Fordham proposes that in instances where the Commission or State Historic Preservation Officer does not resolve contested issues within specified time-frames, there should be a "default outcome of all contested issues in favour of the applicant's position, including those submitted to the Commission for interlocutory resolution."[37] Again, Fordham's proposal is irrational. Section 106 obligates the Commission to ensure that the effects of its undertakings on historic properties are fully considered. Establishing arbitrary time-frames and/or default outcomes with respect to contested issues is flatly inconsistent with the careful consideration of issues mandated by Section 106, and would only encourage tower proponents to behave in a recalcitrant, uncooperative manner, secure in the knowledge that delay will ensure ultimate regulatory victory.

In sum, each of these proposals demonstrates Fordham's continuing disregard for the Section 106 review process. This disregard first manifested itself when Fordham failed to disclose to the Commission that the Lombardi Site is just 150 feet from the Garden. Fordham's contempt for the Section 106 process appears to continue unabated.

Furthermore, Fordham's implicit suggestion that the Commision should contort the NPA to serve Fordham's private interests disserves the goals sought to be achieved in this rulemaking. The broader interests at stake — for the historic

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[36] Id. § 800.4(c).

[37] Comments of Fordham University at 22.

preservation community, the communications industry, and consumers — are all far too great to allow the NPA to be warped to serve the private interests of any single licensee or applicant.

## IV. THE COMMISSION MUST NOT EVISCERATE SECTION 106 REVIEW OF TOWER SITING PROPOSALS.

Setting aside Fordham's comments, other proposals have been made in this proceeding that clearly should be rejected. Although the Garden does not have the resources to address all of those proposals, it nonetheless takes this opportunity to address a few of the more extreme proposals.

### A. Tower Siting Is Subject To Review Under Section 106

Several commenters have urged the Commission to abandon the fundamental legal principle that the issuance of a license that authorizes the construction of radio facilities, including a tower, constitutes an "undertaking" under the NHPA and therefore is subject to Section 106 review.[38]

There is no question that the Commission has, for many decades, consistently adhered to the principle that its licensing actions are "undertakings." As the Notice of Proposed Rulemaking recognizes, "[t]he Commission's environmental rules currently treat construction of licensed communications facilities as 'Undertakings.'"[39]

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[38] See Comments of Sprint Corp. at 7-11; Comments of Verizon Wireless at 3-6. The National Association of Broadcasters ("NAB") similarly argues that tower siting decisions are not subject to the National Environmental Policy Act ("NEPA") because they do not constitute "major Federal action." See Comments of the National Association of Broadcasters at 2-5.

[39] Notice of Proposed Rulemaking ¶ 1 n.6.

The Commission has premised many adjudications of tower disputes on this understanding, including the Garden's case.

Nowhere does the Notice of Proposed Rulemaking suggest that the Commission's longstanding interpretation of the term "undertaking" is in any way inconsistent with congressional intent or that any other rational reason might exist for abandoning the principle that licensing of radio facilities, including a tower, constitutes an undertaking. The plain language of the NHPA makes it clear that an undertaking includes any "project" or "activity" "requiring a federal . . . approval."[40] The rules adopted by the Advisory Council confirm this interpretation, and the Commission is powerless to change those rules.[41]

Moreover, the entire premise of the Notice of Proposed Rulemaking is that the Commission's licensing actions are undertakings. Because the Commission has not given notice that it is considering abandoning this principle (even if lawfully it could), it cannot do so without further notice and comment in accordance with the Administrative Procedure Act.[42]

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[40] 16 U.S.C. § 470w(7). See also Fein v. Peltier, 949 F. Supp. 374, 379 (D. VI 1996) (holding that a "project" or "activity" "requiring a federal . . . approval" is an "undertaking" for the purposes of the NHPA even if it is not federally funded).

[41] See 36 C.F.R. § 800.16(y) (defining undertaking).

[42] See 5 U.S.C. § 553(b). Similarly, it would be impermissible for the Commission to adopt, without further notice and comment, the NAB's position that the issuance of an authorization to construct a tower does not constitute a "major Federal action" for the purposes of NEPA. See Comments of the National Association of Broadcasters at 2-5.

### B. Section 106 Review Must Consider All Historic Properties Eligible For Listing In The National Register.

Some commenters have claimed that Section 106 review does not apply to historic properties that are not listed in the National Register.[43] This claim is wrong.

Section 106 of the NHPA plainly states that "prior to the issuance of any license" the federal agency responsible for issuing the license "shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[44] Furthermore, the Advisory Council's rules implementing the NHPA confirm the understanding that all historic properties listed or eligible for listing in the National Register must be evaluated.[45]

### C. Section 106 Review of Tower Siting Proposals Must Not Be Arbitrarily Limited By Assumptions About Adverse Visual Effects.

Several commenters have advocated the extremist position that a tower has the potential to have an adverse effect on a historic property only if the tower is

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[43] See Comments of American Tower Corp. at 17. Several commenters have taken the somewhat different but related position that non-listed properties are only protected by the NHPA if they have been deemed eligible for listing. See, e.g., Comments of PCIA at 41-44. Those commenters ignore the obvious which is that the Commission itself can deem that a property is eligible for listing. See 36 C.F.R. § 800.4(c)(2).

[44] 16 U.S.C. § 470f (emphasis added).

[45] For example, the Advisory Council's rules state that under Section 106 all "historic properties within the area of potential effects" must be considered, 36 C.F.R. § 800.5(a), and "historic property" includes "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places." Id. § 800.16(l)(1). See also 36 C.F.R. § 800.16(l)(2) (emphasis added) (stating that the term "eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria" (emphasis in original)).

located on the historic property.[46] Others have taken the only slightly less extreme position that only under rare circumstances will a tower have an adverse effect on an adjacent historic property.[47] These theories have been proffered in an attempt to justify broad categorical exclusions to Section 106 review, and should be rejected.

In the Garden's case, the Commission found an adverse effect even though the Lombardi Site is 150 feet from the Garden's perimeter. The Garden has submitted to the Commission an overwhelming amount of unrebutted and irrefutable evidence showing that a tower of any significant height at the Lomdardi Site will have an adverse effect on the Garden.[48]

The Commission cannot premise the NPA on unsupported generalizations about the circumstances under which a hypothetical tower may or may not have an adverse effect on a hypothetical adjacent historic property. The record in this proceeding currently is devoid of any empirical evidence or case studies that would justify any kind of presumption about a tower's potential effects. In the absence of empirical evidence or case studies, proposals for expansive categorical exclusions from Section 106 review must be rejected.

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[46] See, e.g., Comments of AT&T Wireless Services, Inc. at 11-14.

[47] See Comments of PCIA at 39; Joint Comments of Western Wireless Corp. and T-Mobile USA, Inc. at 15-16.

[48] See generally The New York Botanical Garden Petition to Deny and Comments on Environmental Assessment filed June 3, 2002.

## CONCLUSION

For the reasons stated above, the Garden urges the Commission not to apply the NPA retroactively or to adopt any rules or policies that would eviscerate Section 106 review of tower siting proposals.

Respectfully submitted,

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